TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~[illegible]~~. 269.

HIGINIO ROMEU, APPELLANT,

vs.

ROBERT H. TODD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

FILED APRIL 24, 1906.

(20,219.)

(20,219.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 717.

HIGINIO ROMEU, APPELLANT,

vs.

ROBERT H. TODD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 27, 1906.

In the District Court of the United States for Porto Rico.

At an adjourned term of the district court of the United States of merica, within and for the district of Porto Rico, begun and held t the court rooms in the city of Mayaguez, on the fourth Monday of lovember, being the twenty-eighth day of that month, in the year f our Lord one thousand nine hundred and four, and of the Inde-endence of the United States of America the one hundred and wenty-ninth.

Present: The Honorable Chas. F. McKenna, Judge.

Among the proceedings had were the following, to wit:

In Equity.

HIGINIO ROMEU, Plaintiff,
vs.
ROBERT H. TODD, Defendant.

Bill for Injunction and to Quiet Title.

Be it remembered that heretofore, to wit, on the 22nd day of pril, 1904, came the plaintiff by his attorneys and filed in the lerk's office a bill of complaint in this cause, which said bill of omplaint is as follows, to wit:

Bill of Complaint.

n the United States District Court in and for the District of Porto Rico. In Equity.

HIGINIO ROMEU, Plaintiff,
vs.
ROBERT H. TODD, Defendant,

Higinio Romeu, a citizen of Porto Rico, resident of Mayaguez, . R., brings this his bill against Robert H. Todd, a citizen of the nited States, residing in San Juan, P. R.

I. And your orator complains and says: That Robert H. Todd obtained a judgment in the U. S. Provisional Court on April 2, 1900, for the sum of $2,946.05 against Pedro and uan Agostini, and that the same was duly executed and returned *nulla bona.*" And that the said Robert H. Todd, upon the 9th ay of December, 1901, filed a creditor's bill upon the equity side of his Court against Pedro Agostini, Juan Agostini and Ana Merle subject certain property held in the name of Ana Merle for the se and benefit of Pedro Agostini; all of which will more fully appear y copies of said suit, which are on file in this Court, and reference which is hereby prayed for all necessary purposes, without the ecessity of attaching same to this bill as exhibits.

II. Your orator further represents, that among the several properties so held by Ana Merle, there was one consisting of a rural tract of land comprising 21 cuerdas, equivalent to 8 hectareas, 25 areas and 39 centiareas, located in the ward of "Ceballos," municipal district of Mayaguez, having a wooden dwelling house; bounded in the North, South, East and West by lands formerly belonging to Mrs. Isabel Valentina Merle.

III. Your orator further represents that upon the 18th day of December, 1903, your Honor decreed that the aforesaid parcel of lands, specifi-ally described, was purchased by Ana Merle with funds belonging to Pedro Agostini, and that said Pedro Agostini was the owner of the equitable and beneficial title of same.

IV. Your orator further represents unto your Honor that by the aforesaid decree of the 18th of December, 1903, your Honor ordered that the aforesaid 21 cuerdas, with all the improvements thereon, be sold at public auction on the 30th of April, 1904, and by the same decree appointed William Falbe special master to make said sale.

V. Your orator, Higinio Romeu, further represents unto your Honor, that on the 21st day of May, A. D. 1903, your orator
3 purchased from Ana Merle the aforesaid twenty-one cuerdas of land, after duly employing counsel to examine the title of same, for the sum of one thousand two hundred dollars, and that before the said purchase said counsel reported to your orator that Ana Merle had a good and sufficient title to said land, without any liens of any kind whatsoever. A copy of said deed is herewith attached marked Exhibit "A," and made a part of this your orator's bill of complaint.

VI. Your orator further represents unto your Honor, that he had no notice, actual or constructive, of the aforesaid suit of Robert H. Todd *vs.* Juan Agostini, Pedro Agostini and Ana Merle, and that your orator purchased the said property for the sum of $1,200 in cash, and that said money was paid at the time of the making of the deed of conveyance; and your orator further states that he is a *bona fide* purchaser for the value of $1,200 of the said property.

VII. Your orator further represents unto your Honor, that at the time of purchasing said property, the same was an abandoned estate, that the house was rapidly falling to decay, and that the lands were covered with a growth of brambles and brush; and that your orator immediately after purchasing the same, tore down the house upon the premises and built a new one at a cost to your orator of more than $2,000; and your orator further represents that he cleared the land and planted same in coffee, oranges and other fruit trees, at a cost largely exceeding $1,000.

VIII. Your orator further represents unto your Honor, that at the time of purchasing said property, he employed counsel, and that a careful examination was made of the records of said property, in the office of the Registrar of Deeds of Mayaguez, and that those records showed that there were no liens, charges or cautionary notices or mentions of any class whatsoever recorded against said property, and that the said Pedro Agostini, Ana Merle and Juan
4 Agostini informed your orator that the title to the said property was absolutely perfect.

IX. Your orator further represents unto your Honor that the claims of said Robert H. Todd are without any right whatever, for the reason that same were not noted in the Registry of Property, as prescribed by law; and that the said Robert H. Todd is without any estate, right, title, interest or lien whatsoever on the lands, or any portion thereof, heretofore described by your orator, as your orator is now the sole owner of the aforesaid piece of property.

X. Your orator further represents unto your Honor, that the said proposed sale, as aforesaid mentioned, is a cloud upon your orator's title to the said premises, and has the effect to greatly depreciate its value thereof, and to prevent your orator from making a sale of same.

In consideration thereof, and forasmuch as your orator has no sufficient remedy at law for the wrong done and threatened to be done, and that the remedy at law, if any, would afford no protection to your orator for the wrong threatened to be done, for the reasons hereinbefore stated, and is only relievable in a court of equity where matters of this kind are properly cognizable and reviewable.

Your orator prays the Court to grant to him your writ of subpœna directed to the said Robert H. Todd, requiring and commanding him, at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand, perform and abide such order, direction and decree as may be made against him in the premises, as shall seem meet and agreeable to equity.

That your Honor grant unto your orator a writ of injunction, commanding the said defendant, his agents, attorneys, servants and employees, and all other persons acting under his authority, direction or control, to absolutely desist and refrain from selling the aforesaid property or allowing the sale of same at public auction, and that your Honor declare that said Robert H. Todd, or any person claiming by or through him, are without lien or interest in the aforesaid 21 cuerdas, with the appurtenances thereunto belonging.

That said defendant be restrained from the commission of any of the acts hereby sought to be enjoined, and that upon such hearing, the writ herein prayed for pending this suit be made and confirmed until the final determination of this action, and that thereupon said injunction be made perpetual.

That upon the final hearing of this suit, your orator be confirmed in his title to the aforesaid twenty-one cuerdas, with the appurtenances thereunto belonging.

And that your orator may have such other and further relief, preliminary and final, as to the Court may seem meet and proper, and which equity may require, and for costs.

HORTON & CORNWELL,
Solicitors for Complainant.

Higinio Romeu makes oath according to law, deposes and says: That the matters and things alleged in this bill are true in points of fact.

HIGINIO ROMEU.

Subscribed and sworn to before me this 19th day of April, 1904.

MARIANO RIERA PALMER,
Notary Public.

6 *Affidavit.*

Filed April 23, 1904.

In the United States District Court in and for the District of Porto Rico. In Equity.

HIGINIO ROMEU, Plaintiff,
vs.
ROBERT H. TODD, Defendant.

I, Higinio Romeu, the above named plaintiff, make oath and say as follows:

1. That I am the owner of a certain parcel of land, to wit: A rural tract of land comprising 21 cuerdas, equivalent to 8 hectareas, 25 areas and 38 centiareas, located in the ward of "Ceballos," municipal district of Mayaguez, having a wooden dwelling house, bounded on the North, South, East and West by lands formerly belonging to Mrs. Isabel Valentina Merle.

2. Deponent further states, that he acquired the said above described property by purchase from Ana Merle, on the 21st day of May, 1903, after duly employing counsel to examine the title of same, and that before the said purchase said counsel reported to deponent that said Ana Merle had a good and sufficient title to the said land, without any liens of any kind whatsoever.

3. Deponent further states that he paid a good and valuable consideration for the said parcel of land, to wit, the sum of one thousand two hundred dollars; and that at the time of said purchase he was a *bona fide* purchaser for value and had no notice of any liens or incumbrances of any kind whatsoever existing on the said parcel of land.

7 4. Deponent further states that at the time of purchasing said property, the same was an abandoned estate, that the house therein situated was rapidly falling to decay, and that the lands were covered with brambles and brush, and that deponent immediately after purchasing said premises, tore down the house and built a new one, at a cost to this deponent of more than $2,000; and this deponent further states that he cleared the land and planted same in coffee, oranges and other fruit trees, at a cost largely exceeding $1,000.

5. Deponent further states that the counsel by him employed made a careful examination of the records of said property, in the office of the Registrar of Deeds of Mayaguez, and that those records showed that there were no liens, charges or cautionary notices or mentions of any class whatever; and further states that Pedro Agostini and Ana Merle, former owners of the land, informed him that the title to the said property was absolutely perfect.

The facts and circumstances deposed to by me in the five paragraphs of this affidavit are true and within my own personal knowledge, except as to those matters therein stated to be known on information, which I have received from counsel by me employed for that purpose, and from the said Pedro Agostini and Ana Merle, former owners of the land.

HIGINIO ROMEU.

Subscribed and sworn to before me this 19th day of April, 1904.

MARIANO RIERA PALMER,
Notary Public.

Order.

Filed April 29, 1904.

The United States District Court for Porto Rico.

HIGINIO ROMEU
vs.
ROBT. H. TODD.

8 This is a motion for a temporary injunction against the sale of a certain tract of land under decree of this Court, and which is described in the bill. The complainant has appeared by his solicitors, Horton & Cornwell, and the motion is opposed by the defendant, Robt. H. Todd, by his solicitor, N. B. K. Pettingill. Owing to the Court being in session at San Juan, it has not had opportunity to fully examine the question presented, and a temporary restraining order is therefore granted, restraining the sale of said land, which was ordered to take place on April 30, 1904, until the further order of this Court, and the defendant and Wm. Falbe, special master appointed to make said sale, will conform all action to this order.

Given under my hand this April 29, 1904.

WM. H. HOLT, *Judge.*

Demurrer.

Filed June 6, 1904.

In the United States District Court for Porto Rico.

No. 253. San Juan.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Now comes the defendant, by his solicitor N. B. K. Pettingill, and says that the bill of complaint filed in the above-entitled cause is not

sufficient in law to be answered unto and does demur thereto, and for cause of demurrer shows:

1st. That the said complain-t has not in and by his said bill made or stated such a case as entitled him to the relief prayed for therein, or to any relief in a court of equity.

2nd. That it appears from the allegations of complainant's
9 bill that the equitable doctrine of *lis pendens* is applicable to his alleged rights, and that he had in law constructive notice of the pendency of defendant's suit in equity at the time of his purchase.

Wherefore, defendant prays judgment whether he ought to be compelled further to answer complainant's said bill, and prays to be hence dismissed.

N. B. K. PETTINGILL,
Solicitor for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

N. B. K. PETTINGILL,
Of Counsel for Defendant.

Decree.

June 2, 1905.

In the U. S. District Court for P. R.

HIGINIO ROMEU
vs.
ROBERT H. TODD.

Bill for Injunction.

This cause coming on to be heard upon the demurrer of the defendant to the bill of complaint, and the briefs of counsel for the respective parties having been duly considered, it is hereby ordered that said demurrer be sustained, and the complainant not desiring to plead farther by way of amendment, it is hereby further ordered and decreed that said bill of complaint be dismissed at the cost of complainant and the temporary injunction heretofore granted herein be dissolved, to which ruling complainant by his counsel excepts.

Done and decreed in open Court at Mayaguez, Porto Rico, this 2nd day of June, A. D. 1905.

CHAS. F. McKENNA, *Judge.*

10 *Opinion.*

(Filed June 5, 1905.)

No. 253. Eq.

HIGINIO ROMEU
vs.
R. H. TODD.

Complainant filed this bill to remove a cloud on his title to the real estate therein described and to restrain defendant from proceeding to sell real estate. Defendant demurs to the bill on the ground that it does not disclose a cause of action. In order to maintain this action the bill must show title in plaintiff and that defendant is setting up a cloud upon it.

From the pleadings it appears that Robert H. Todd the defendant on December 9th, 1901, filed a creditor's bill in this Court against Pedro Agostino, Juan Agostino and Ana Merle. A subpœna was awarded and properlt served and the case was duly prosecuted. On December 18th, 1903, a decree was entered by this Court in favor of Todd. On May 21, 1903, Ana Merle one of the defendants conveyed the property then in litigation to Hinino Romeu the Complainant in this bill. It is therefore admitted that the complainant purchased the land involved in this controversy from a party defendant to a proceeding in equity then pending in this Court. His purpose in filing the bill is to remove a cloud on the title so purchased by him arising from the final decree of this Court in that litigation against his vendor and to restrain the execution of that decree.

As this is a proceeding on the equity side of the Court it is governed by the principles of equity followed by the Federal Courts as distinguished from suits at law where local statutes are adopted. As local laws have no binding force upon the United States Courts in matters of procedure in equity and maritime law, the laws of Porto Rico relating to filing of notice of *lis pendens* have therefore no application in this case and the sufficiency of this bill
11 must be determined by the rules and principles followed in like proceedings in the Courts of the United States—Stewart *vs.* Wheeling & Lake Erie R. R. Co. 29 L. R. A. 438. Complainant's title being derived from a party to litigation pending at the time of his purchase what effect had the ultimate result of that litigation on his title. If he was affected with notice of the proceedings pending at that time it follows that he is not entitled to maintain his bill in this case. Chancellor Kent in Murray *vs.* Ballou 1 Johns. 566 said "a pending suit in equity duly prosecuted and not collusive is notice to a purchaser of the property in dispute from a party to the litigation so as to affect and bind his interest by the decrss and *lis pendens* begins from the service of the subpœna after the bill is filed." "It is a settled principle that the purchaser of property in

litgation *pendente lite* is bound by the judgment or decree in the suit; and the rule is said to be founded upon great public policy—for otherwise alienations made during a suit might defeat its whole purpose and there would be no end to litigation." 1st Story Equity Jur. Sect. 405-406. Inter State Com. *vs.* Western New York & P. R. R. Federal Reporter Vol. 82 page 192. Clearly then as the complainant purchased this property then in dispute from a party to the litigation long after the filing of the bill and services of subpœna it is therefore bound by the decree in that case. A pending suit in equity operates as constructive notice to the world and a purchaser *pendente lite* is bound by the final result of the litigation.

The decree of December 18th, 1903, has established that complainant's vendor held the land as trustee subject to the lien of this defendant and complainant took no better title than his vendor but whatever title passed to complainant from Ana Merle was subject to the lien of the claim of defendant in this bill.

It is apparent that the facts set forth in complainant's bill do not show a title or incumbrance apparently valid but in fact invalid as is necessary to constitute such a cloud as entitles a party to
12 relief in equity but on the contrary the admitted facts show a perfectly valid incumbrance which we are without power to disturb and therefore this bill does not present a sufficient cause of action. If the bill cannot be maintained to remove the cloud neither can the defendant be restrained from proceeding with the sale of the land in dispute. No appeal having been taken the decree of this Court has long since become final and conclusive and defendant can proceed by appropriate writ of execution. Lacassagne *vs.* Chapius 144 U. S. 125.

We are of the opinion that the bill filed in this case does not disclose a cause of action and the demurrer is therefore sustained and bill dismissed at cost of complainant.

(Signed) CHAS. F. McKENNA, *Judge.*

K.

13 *Petition for Appeal to the Supreme Court of the United States.*

Filed June 10, 1905.

In the District Court of the United States in and for the District of Porto Rico.

HIGINIO ROMEU, Complainant,
vs.
ROBERT H. TODD, Defendant.

The above-named complainant, conceiving himself aggrieved by the decree made and entered on the 2nd day of June, 1905, sustaining the demurrer interposed by the defendant to the complainant's bill of complaint, in the above-entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed

herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this second day of June, A. D. 1905.

F. L. CORNWELL,
Solicitor for Complainant.

The foregoing claim of appeal is allowed.

CHAS. F. McKENNA, *Judge.*

14 *Affidavit.*

Filed June 10, 1905.

In the District Court of the United States in and for the District of Porto Rico.

HIGINIO ROMEU, Complainant,
vs.
ROBERT H. TODD, Defendant.

Higinio Romeu, being duly sworn, and under oath deposes and says: That he is the complainant in the above suit, which suit is brought to remove a cloud from the title and also to restrain the defendant, his agent, attorneys, servants and employees, and all other persons acting under his authority, direction or control from selling the following property: A rural tract of land comprising twenty-one cuerdas, equivalent to eight hectareas, twenty-five areas and thirty-nine centiareas, located in the ward of "Ceballos," municipal district of Mayaguez, bounded on the North, South, East and West by lands formerly belonging to Mrs. Isabel Valentina Merle, improved with a two-story wooden dwelling and planted in coffee, oranges and other fruit trees. That the value of the aforesaid property exceeds the sum of five thousand dollars ($5,000), exclusive of the costs of this suit.

HIGINIO ROMEU.

Subscribed and sworn to before me this 6th day of June, 1905.

FERNANDO VÁSQUEZ,
Notary Public.

15 *Assignment of Errors.*

Filed June 10, 1905.

In the District Court of the United States in and for the District of Porto Rico.

HIGINIO ROMEU, Complainant,
vs.
ROBERT H. TODD, Defendant.

Complainant prays an appeal from the final decree of this Court, sustaining the demurrer of the defendant to the complainant's bill of complainant, to the Supreme Court of the United States, and assigns for error:

First. That the Court erred in sustaining the demurrer to the bill and dismissing the bill.

Second. That the Court erred in dismissing the temporary injunction.

Third. That the Court erred in sustaining the demurrer, in that the order or decree of the Court is in direct contravention to the laws of Porto Rico, articles 433, 434, 435, 436, 446, 448 and 1295, Civil Code of Porto Rico, which was in effect at that time, and articles 2, 23, 34, 42, 43, 69, 281 and 283 of the Mortgage Law of Porto Rico, and articles 91 and 126 of the Execution of the Mortgage Law of Porto Rico, which provide generally that the pendency of a suit does not constitute a lien on the property unless a notice of *lis pendens* is filed with the Registrar of Property in the district in which the property is located.

Fourth. That the Court erred in sustaining the demurrer, in that the order or decree of the Court is in direct contravention to section 8 of the Organic Act of Porto Rico, an Act entitled "An Act
16 temporarily to provide revenue and civil government for Porto Rico, and for other purposes," passed by the Congress of the United States and approved April 12, 1900, providing that the laws of Porto Rico then in force shall continue in full force and effect in so far as they are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable.

Fifth. That the Court erred in sustaining the demurrer, in that the order or decree is in direct contravention of the laws of the United States.

F. L. CORNWELL,
Solicitor for Complainant.

17 *Entry on Journal.*

(June 10, 1905.)

No. 253. Eq.

HIGINIO ROMEU
vs.
ROBT. H. TODD.

Now comes the complainant by his solicitor, F. L. Cornwell, and files a petition for appeal, which is allowed. The said complainant also files an assignment of errors and a bond for costs on appeal, which said bond is approved and filed.

18 *Bond.*

(Filed June 10, 1905.)

No. 253. Eq.

HIGINIO ROMEU, Complainant,
vs.
ROBERT H. TODD, Defendant.

Know all men by these presents, that we, Higinio Romeu as principal, and Felipe B. Rodriguez and Manuel Montalvo Colberg, as sureties, are held and firmly bound unto the defendant, Robert H. Todd, in the full and just sum of Two thousand and five hundred dollars, ($2,500), to be paid to the said defendant Robert H. Todd, his certain attorneys, executors, administrators or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and date- this 5th day of June, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at the District Court of the United States in and for the District of Porto Rico, in a suit pending in said Court, between Higinio Romeu complainant and Robert H. Todd, defendant, a decree was rendered against the said Higinio Romeu, sustaining the demurrer filed by the defendant to the bill of complaint, and the said Higinio Romeu, having obtained an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit and a citation directed to the said Robert H. Todd, citing and admonishing him to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C. on the — day of ——, 1905.

19 Now the condition of the above obligation is such, that if the said Higinio Romeu shall prosecute his appeal to effect, and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void; else to remain in full force and effect.

HIGINIO ROMEU. [SEAL.]
MANUEL MONTALVO COLBERG. [SEAL.]
F. B. RODRIGUEZ. [SEAL.]

Sealed and delivered in presence of
MANUEL A. CARTO.
FRANCISCO R. MARTINEZ.

ISLAND OF PORTO RICO, *City of Mayaguez, ss:*

Felipe B. Rodriguez and Manuel Montalvo Colberg, sureties named in the foregoing bond, being first duly sworn, each for himself says: That he is a resident and freeholder in the Island of Porto Rico and is worth the sum of Twenty five hundred dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution.

MANUEL MONTALVO COLBERG.
F. B. RODRIGUEZ.

Subscribe- and sworn to before me this 6th day of June, 1905.

FERNANDO VASQUEZ,
[SEAL.] *Notary Public.*

The foregoing bond is approved this 10th day of June, 1905.

CHAS. F. McKENNA,
Judge U. S. District Court for Porto Rico.

K.

Copy.

20 In the District Court of the United States for Porto Rico.

253. Equity.

HIGINIO ROMEU
v.
ROBERT H. TODD.

I, H. H. Scoville, Clerk of the District Court of the United States for Porto Rico, do hereby certify the foregoing nineteen typewritten pages, numbered from 1 to 19 inclusively, to be a true and correct copy of the record and proceedings in the above and therein entitled cause as the same remains of record and on file in the office of the clerk of said Court.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of March, A. D. 1906.

[Seal United States District Court for the District of Porto Rico.]

H. H. SCOVILLE,
Clerk of the District Court of the United States for Porto Rico.

Endorsed on cover: File No. 20,219. Porto Rico D. C. U. S. Term No. 717. Higinio Romeu, appellant, *vs.* Robert H. Todd. Filed April 24th, 1906. File No. 20,219.

FILE COPY.

Office Supreme Court, U. S.
FILED.
NOV 23 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 269.

HIGINIO ROMEU, APPELLANT,

vs.

ROBERT H. TODD.

BRIEF AND ARGUMENT FOR APPELLANT.

FREDERICK L. CORNWELL,
Counsel for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23983

(20,219)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 269.

HIGINIO ROMEU, APPELLANT,

vs.

ROBERT H. TODD, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of the Case.

This was a suit in equity brought by Higinio Romeu, a citizen of Porto Rico and a resident of Mayaguez, P. R., complainant, in the district court of the United States for Porto Rico, against Robert H. Todd, a citizen of the United States and a resident of San Juan, P. R., defendant, to remove a cloud on complainant's title to certain real estate, described in the bill of complaint filed therein, and praying that a temporary injunction be issued, to be made perpetual upon final hearing.

The facts as they appear from the pleadings may be summarized as follows: The defendant Robert H. Todd, on the

2d day of April, A. D. 1900, obtained a judgment in the United States Provisional Court for Porto Rico for the sum of $2,946.05 against Pedro Agostini and Juan Agostini, and under said judgment execution was duly issued and returned by the marshal *"nulla bona."* Thereafter, upon the 9th day of December, A. D. 1901, Robert H. Todd filed a creditor's bill upon the equity side of the district court of the United States for Porto Rico, which court had, by act of Congress, taken the place of the United States Provisional Court for Porto Rico, against Pedro Agostini, Juan Agostini, and Ana Merle to subject certain properties, held in the name of Ana Merle, for the use and benefit of Pedro Agostini. Among the several properties so held by Ana Merle, was one consisting of a rural tract of land comprising 21 cuerdas (acres), equivalent to 8 hectares, 25 areas, and 39 centiareas, located in the ward of "Ceballos," municipal district of Mayaguez, bounded on the north, south, east, and west by lands formerly owned by Isabel Valentina Merle, and improved with a wooden dwelling house. On the 18th day of December, A. D. 1903, the said district court of the United States for Porto Rico rendered its decree in said suit, adjudging and decreeing that the aforesaid tract of land specifically described, and which is the subject-matter of this suit, was purchased by Ana Merle with funds belonging to Pedro Agostini, and that said Pedro Agostini was the owner of the equitable and beneficial title of same, and further adjudged and decreed that the said tract of land, with all improvements thereon, be sold at public auction upon the 30th day of April, A. D. 1904, and by same decree appointed William Falbe special master to make such sale. Upon the 21st day of May, A. D. 1903, while the said suit was pending in the district court of the United States for Porto Rico, between Robert H. Todd, complainant, and Pedro Agostini, Juan Agostini, and Ana Merle, but before any decree was made and entered, the appellant, Higinio Romeu, purchased from Ana Merle the said tract of land of 21 cuerdas for the

sum of $1,200. The purchase was only made, however, after the appellant had employed competent counsel to examine the title to said land, and after counsel had made a thorough examination of the records in the office of the registrar of property at Mayaguez, in which office the title to said land was inscribed, and had reported that the title to same was absolute in Ana Merle, and that there were no liens or incumbrances on same of any kind whatsoever. The purchase of the land by the appellant was made in absolute good faith, for a good and valuable consideration, without notice of any kind of the pendency of the suit in the district court of the United States for Porto Rico, in which Ana Merle was a defendant, and his title was registered in the registry at Mayaguez on June 1st, 1903. In the records at the registrar's office, in the city of Mayaguez, in which district the land was located, the property appeared registered in the name of Ana Merle, absolutely, without any liens or conditions. There was no cautionary notice of the pendency of the suit or any *lis pendens* filed with the registrar of property or with anyone else. The appellant, after purchasing the property, which was in an abandoned condition, tore down the house thereon and constructed a new one, at a cost of $2,000, cleared the land and planted the same in coffee, oranges, and other fruits at an expense exceeding $1,000. This suit, which is now before this court on appeal, was filed by Higinio Romeu, complainant, upon the 23d day of April, A. D. 1904, in the district court of the United States for Porto Rico, against Robert H. Todd, defendant, praying for a temporary injunction, to be made perpetual upon final hearing, to prevent the sale of the said property on the 30th day of April, 1904, as was ordered in the decree rendered on the 18th day of December, 1903, to enjoin the defendant from claiming any title or interest in said land, and to remove the cloud from complainant's title (Rec., pp. 1 to 4). Upon the 29th day of April, 1904, a temporary restraining order was granted by the court, restraining the sale of the land on the 30th day of April, 1904, as had been

theretofore decreed, until further order (Rec., p. 5). Upon the 6th day of June, 1904, the defendant Todd filed a demurrer to the bill of complaint, alleging as grounds, that the bill of complaint did not state such facts as entitled complainant to relief in a court of equity, and that it appeared from the bill of complaint that the equitable doctrine of *lis pendens* was applicable, and that complainant, in law, had constructive notice of defendant's suit in equity at the time of his purchase (Rec., pp. 5 and 6). Upon the 2d day of June, 1905, the court, after hearing arguments of counsel, sustained the demurrer, and complainant refusing to plead, further ordered and decreed that the bill of complaint be dismissed and the temporary injunction be dissolved, from which order and decree appellant appealed.

ERRORS.

I. The court erred in sustaining the demurrer to the bill and dismissing the bill.

II. The court erred in dismissing the temporary injunction.

III. The court erred in sustaining the demurrer, in that the order or decree of the court is in direct contravention to the laws of Porto Rico, articles 433, 434, 435, 436, 446, 448, and 1295, Civil Code of Porto Rico, which was in effect at that time, and articles 2, 23, 34, 42, 43, 69, 281, and 283 of the Mortgage Law of Porto Rico, and articles 91 and 126 of the execution of the Mortgage Law of Porto Rico, which provide generally that the pendency of a suit does not constitute a lien on the property unless a notice of *lis pendens* is filed with the registrar of property in the district in which the property is located.

IV. The court erred in sustaining the demurrer, in that the order or decree of the court is in direct contravention

to section 8 of the organic act of Porto Rico, an act entitled "An act temporarily to provide revenue and civil government for Porto Rico, and for other purposes," passed by Congress of the United States and approved April 12th, 1900, providing that the laws of Porto Rico then in force shall continue in full force and effect in so far as they are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable.

V. The court erred in sustaining the demurrer, in that the order or decree is in direct contravention of the laws of the United States.

ARGUMENT.

I.

Under the laws of Porto Rico a conveyance of real property can neither be attacked nor rescinded where such property is legally in the hands of a third party who has not acted in bad faith.

It is provided by the Statutes of Porto Rico, that:

"Rescission obliges the return of the things which were the object of the contract, with their fruits and the sum with interest; therefore it can only be carried into effect when the person who may have claimed it can return that which, on his part, he is bound to do.

"Neither shall rescission take place when the things which are the object of the contract are legally in the possession of third persons who have not acted in bad faith" (Civil Code, Rev. Stat., 1902, section 1262).

And it is further provided, that:

"A *bona fide* possessor is deemed to be a person who is not aware that there exists in his title or the manner of

acquiring it, any flaw invalidating the same" (Civil Code, Rev. Stat., ed. 1902, sec. 436).

The appellant purchased the land in question after making due and diligent inquiry in the proper office as to the conditions of the title thereto, acquiring the title and possession thereof in good faith and in a legal manner, fraud, cheat, or deceit being absent from the transaction, he having no knowledge of any flaw in his title, and recorded the same according to law. His title and possession are then unassailable.

"Suits for rescission or determination of title shall not be instituted against third persons who have recorded the instruments of their respective interests in conformity with the provisions of this law" (Mortgage Law, sec. 36).

As showing with how much favor the law looks upon possession, once it is acquired, the following sections may be quoted:

"Good faith is always presumed, and any person averring bad faith on the part of the possessor is bound to prove the same" (Civil Code, Rev. Stat., ed. 1902, sec. 437).

"The possessor who believes himself owner has in his favor the legal presumption that he possesses under a just title, and he cannot be compelled to show the same" (Civil Code, Rev. Stat., ed. 1902, sec. 450).

It is evident that under these provisions the title of the appellant is unassailable, there being no inscription of the *lis pendens* and he being a purchaser in good faith.

II.

In Porto Rico the registry of the property is the only office for the information of prospective purchasers of land as to conditions of title thereto, and one who purchases land in litigation from one of the parties to the suit acquires a good title if upon due search being made in said registry nothing is found that will affect the title to be acquired.

The mortgage law, which is the substantive law of real property, in force in the island, is clear as to what shall be entered or recorded in the registries created and established by it, and its provisions are controlling in this case.

"Cautionary notices of their respective interests in the corresponding public registries may be demanded by:

"1. The person who enters suit for the ownership of real property, or for the creation, declaration, modification, or extinction of any property right" (Mortgage Law, article 42).

"The person who brings the action for ownership in case No. 1 of article 42 of the law may at the same time or subsequently request that a cautionary notice thereof be made, offering to indemnify any damages which may be caused the defendant thereby, should he win the suit."

Execution of the Mortgage Law, article 91.

In commenting upon the meaning and scope of section 42 (*supra*) a Spanish author, in his standard work, expresses himself as follows:

"No. 1 of article 42 limits the right to demand a cautionary notice to him who sues for the ownership of real property, or the creation, declaration, modification or extinction of any property right; but the case of a suit for the ownership of an interest in real estate (derecho real) is not covered thereby. And as by No. 1 of Article 2 (to which article 42 is correlative), titles transferring the ownership

of interests in real estate (derechos reales) are expressly declared to be inscribable, it seems that express mention should have been made in No. 1 of article 42 of the right to obtain a cautionary notice of the complaint in a suit for the ownership of any interest in real estate (derecho real). See decision of October 12, 1875 (Supreme Court of Spain).

"At any rate, even though there is such an omission in the letter of No. 1 of article 42, there can be no doubt that *it would be contrary to its spirit to deny said cautionary notice, it having been so declared on April 13th,* 1868" (Decision Supreme Court of Spain).

And the same author says further that:

"It is true that the cautionary notice does not prevent the alienation or incumbrance of the properties which are recorded in the defendant's name; it is true that it does not prejudge the outcome of the suit; but the circumstance that a cautionary notice of a complaint in a suit over a property has been entered, may influence one who might desire to contract regarding it."

Galindo & Escosura, Commentaries on the Mortgage Legislation of Spain, vol. 2, pp. 426-7.

In the report of the Spanish Code Commission, in the statement of motives and grounds for the Mortgage Law, the following statement is found:—

"As the judicial mortgage" (former name for cautionary notice) "does not spring from the will of the owner of the thing mortgaged, the power of private persons to demand, and of judges to grant it must be restricted. The restraint upon the right to property can be justified only when it has for its object the protection of other rights none the less to be protected, or the taking of necessary precautions to prevent the debtor or litigant from making impossible the enforcement of an executory judgment, when the day comes. * * *"

See Galindo & Escosura, Commentaries on the Mortgage Legislation of Spain, vol. 1, p. 102.

Under these provisions, if the defendant below wanted his suit to operate as a lien upon the property, and as notice to

the world of the pendency of said suit, it was his duty to have entered on the books of the proper registry a cautionary notice thereof, first obtaining a proper order to that effect from the court where the suit was brought (Mortgage Law, article 43; execution of the Mortgage Law, article 126, subd. 2), and having failed to do so he is not protected as against third persons purchasing where the vendor had duly recorded his title, and "according to the registry was competent to convey" (Mortgage Law, article 69). His suit was one to subject the property in question to the satisfaction of a judgment, and this would clearly have but one result, *i. e.*, the "extinction of a property right," thus coming within the scope of the provisions contained in the articles under discussion.

The appellant had a perfect right, according to the local laws, to rely upon his search in the registry for ascertaining the conditions of the title to the property which was about to be conveyed to him; and finding that there was nothing in the books showing that there was any action or suit of any kind pending with regard to the land, he acquired a good title when he purchased, and registered the conveyance to him, thus complying with the requisites of the Mortgage Law.

Whatever should be recorded and is not recorded or inscribed has no effect at all as against third persons. The law provides:

"In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use, use and occupancy, emphyteusis, mortgage, annuity (censo), servitudes, and any others by which estates are created, acknowledged, modified, or extinguished."

* * * * * * *

Mortgage Law, article 2.

"The instruments mentioned in articles 2 and 5 which are not duly recorded or entered in the registry cannot prejudice third persons."

* * * * * * *

Mortgage Law, article 23.

Galindo & Escosura, in their Commentaries on the Mortgage Law, have remarked the following about this section:

"Section 23 is so important that the minister of grace, and justice, when sending in his report on mortgage legislation, said that if the law was analyzed, if it was condensed, *this section in itself would be the law*" (See Galindo & Escosura, Commentaries on the Mortgage Legislation of Spain, vol. 2, p. 272).

The attention of the court may be still further called to article 283 of the Mortgage Law, whereby the fact that real property or property rights are encumbered can only be proven to the prejudice of third persons by certificates issued by the registrar describing the conditions of a particular property as it may appear from the books in the registry. To issue these certificates there must have been made in the books of the registry the entries or records to which they are to refer, and a third person who buys property, relying upon certificates or searches made which reveal the nonexistence of liens or encumbrances on it, if he has ascertained that there is nothing on record that would affect the title to said property, cannot be charged afterward with notice of the pendency of a suit of which nothing appears on the books where he is directed by law to search and to rely upon that search for his protection; and if an action or suit is brought, the subject-matter of which is real property, and no cautionary notice of it is entered on the books of the proper registry, a third person buying that property cannot be charged with notice thereof, even though he buys during the pendency of the litigation. The party failing to enter

the cautionary notice alone should suffer for the consequences of his own negligence.

As still further showing the importance and necessity for registration and inscription under this system, a discussion of the following sections of the Mortgage Law may be useful:

Section 34 provides:

"* * * the instruments or contracts executed or covenanted by a person who, *according to the registry,* has a right thereto, shall not be invalidated with regards to third persons, *after they have once been recorded,* although later the right of the person executing them is annulled or determined by virtue of a prior deed not recorded, or for reasons which do not clearly appear from the registry."

Commenting upon this section, Galindo & Escosura have said:

"* * * even though it may seem harsh and unequitable that a formality such as inscription, may give or take away rights, it is yet necessary to acknowledge that no other thing was possible within the system of public registration."

Galindo & Escosura, Comm. on the Mortgage Legislation of Spain, vol. 2, p. 361.

Under this provision it is only in the registry where prospective purchasers may learn whether their vendors have a "right" to convey, or, in other words, to execute or covenant the conveyance, and the record is made the safeguard of buyers. So that if A wants to buy B's land, and he does so after ascertaining from the registry that B has a right to execute or covenant the conveyance, he will get a good title, and, upon registering the same, it will become perfect and unassailable. It is for some purpose that registries are made public, and that parties are not held bound to take notice of whatever does not appear in the books kept in those offices, and that purpose is to protect those who, taking advantage of the provisions of the law, deal with property, relying upon what the proper registry shows to be its condition, and to

secure good titles to those who register them according to law.

Under the local system of registration even prescription must be recorded in order that it may ripen into a good title. The law holds so clearly:

"A prescription which does not require a just title" (a title sufficient in law to transfer dominion or property right) "shall not prejudice third persons, if its possessory title is not recorded.

"Neither shall a third person be prejudiced by prescription which requires a just title if the latter is not recorded."

* * * * * * *

Mortgage Law, article 35.

As it has been rightly said Galindo & Escosura, "* * * there is no true property right with all the rights flowing from it, unless the same is recorded."

There can be no question as to whether the Mortgage Law is in force in Porto Rico. It is expressly provided by the Civil Code, in its chapter relative to mortgages, that:

"Besides the requisites mentioned in section 1758 it is indispensable, in order that the mortgage may be validly constituted, that the instrument in which it is created be entered in the registry of property" (Civil Code, Rev. Stat., ed. 1902, Chap. III, sec. 1776).

And the same code further provides:

"The form, extension, and effect of the mortgage, as well as that relating to its creation, modification and extinction, and all that which may not have been included in this chapter, *shall be subject to the provisions of the Mortgage Law, which continues in force.* (*Id., id.,* sec. 1781.)

III.

The equitable doctrine of lis pendens being inapplicable to the case at bar, the United States district court should have decided as the insular court would do in the premises.

The doctrine of *lis pendens,* as it is known to the American jurisprudence and is applied by the federal courts, cannot operate as against the appellant. The jurisprudence of Porto Rico differs widely from that of the States of the Union in many vital respects, and it is peculiar to the Spanish system still largely in force in the island. Under the Spanish law *lis pendens* is not recognized as having the same scope and latitude as it has in American equity jurisprudence, but it is limited by the recording act which forms part of the Mortgage Law; and according to the provisions of this law and the authorities thereon one bringing a suit, whether in what would be known to us as equity or at law, the object of which is to subject property of the defendant to the satisfaction of a judgment, or in any other manner affect his property, must enter a cautionary notice of the complaint or attachment, if any, in the proper registry, in order that it may operate as notice as against third persons who may deal with the property the object of the suit, and thus bind them to the outcome and consequences of the litigation.

In Smith *vs.* Gale, a case decided by this court in 1891, a person purchased real estate in litigation from the party in possession in good faith and without notice of the pendency of the litigation. The court held that such party might acquire a good title as against the other party if no *lis pendens* have been filed, the court speaking as follows:

"In order to charge purchasers of property with notice of pendency of suit, it is necessary, under the statutes of Dakota, to file *lis pendens* with the registry of deeds of the county in which the land is situated, containing the names

of the parties, the object of the action, and a description of the property. There appears to have been no *lis pendens* filed in this case, and hence no constructive notice of suit, as the court finds that Mrs. McKennan was an innocent purchaser of the property for a valuable consideration, and had no notice or knowledge of the pendency of the action, and as there is no evidence to contradict this, we know of no reason why she or Grigsby should not be held to have acquired a good title to the property, *although purchased during the pendency of this litigation*" (144 U. S., 509).

It is well established that the federal courts are bound to decide precisely as the State courts ought to do, where their decision will affect titles to real property. Numerous authorities might be cited in which this rule is laid down and followed, but we shall content ourselves with referring to the following only:

Hinde *vs.* Vattier, 5 Pet., 398; 8:170.
Union Pacific Ry. Co. *vs.* Reed, 80 ed. Rep., 234–9.
Hoge *vs.* Magnes, 85 Fed. Rep., 355–7.

In Hinde *vs.* Vattier (*supra*) the rule laid down by the court and which has been repeatedly followed is that—

"There is no principle better established and more uniformly adhered to than that the circuit courts in deciding on titles to real property in the different states, are bound to decide precisely as the state courts ought to do. *The rules of property* and of evidence, whether derived from the laws and adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the union in all cases to which they apply, where the Constitution, treaties or statutes of the United States do not otherwise provide."

The United States courts also follow the decisions of the highest court of a State where they settle rules of law relating to real property.

Myers *vs.* Reed, 17 Fed. Rep., 404.
O'Connell *vs.* Reed, 5 C. C. A., 586.
Belding *vs.* Hebard, 43 C. C. A., 296-308.

The provision of the statutes of the United States on this subject is substantially and in effect that, excepting matters of procedure in equity and maritime law, *the United States courts are bound by and shall apply local laws.*

U. S. Rev. Stat., tit. XIII, ch. XVIII, sec. 913, p. 174.

There can be no doubt as to the correctness of the proposition that the court below should have followed the local laws and applied the same under the rules quoted from Smith *vs.* Gale and Hinde *vs.* Vattier and the statutory provision referred to.

The judgment of the insular courts would have been for the appellant, had this case come up before them, and for him should have been the decree of the United States court.

The Supreme Court of Porto Rico has held that where one obtained a judgment in the United States Provisional Court, and by reason thereof a levy or attachment was made upon property of the defendant, which was subsequently sold, *without having entered a cautionary notice* of the levy or attachment, but the purchaser registering his title under the sale, one, who suing in the insular courts obtains a judgment and attachment on the same property against the same defendant, *and enters a cautionary notice thereof,* will not be prevented from going on with his suit until execution of the judgment and sale of the property thereunder, and where a district court makes an order to the contrary it will be reversed.

See the decision of the Supreme Court of Porto Rico of November 25th, 1903.

In this case the party who sued in the United States Provisional Court filed no cautionary notice thereof, but only registered his title under the sale in the said court, and the party suing in the insular court registered his cautionary notice upon bringing suit and before the title of the purchaser in the United States court was registered. Under

the decision one purchasing from the plaintiff in the suit brought in the insular court would take subject to that suit, but not subject to that brought in the United States court, *as no cautionary notice* of the latter *was entered* in the registry as required by the Mortgage Law.

The sections of the Mortgage Law which have been discussed are part of the substantive law of Porto Rico. They grant a right of which a party may take advantage or not as he sees fit. That right is the entering of a cautionary notice, the consequence of which is the subjection of property to a lien in favor of the party exercising it, and the notification to the world that such burden has been imposed upon that property, and that those dealing with it do so at their peril.

The Civil Code of Porto Rico provides that:

"The form, extension and effects of the mortgage, as well as that relating to its creation, modification and extinction, and all that which may not have been included in this chapter, *shall be subject to the provisions of the Mortgage Law*, which continues in force."

Civil Code, Rev. Stat., ed. 1902, sec. 1781.

It is unquestionably true that the fact that this provision regarding the Mortgage Law is found in the Civil Code shows in a conclusive manner that it is part of the substantive law, and was thus considered by the codifiers and revisers of the local statutes. And even the United States district court for Porto Rico recognized this fact when it adopted its rules in the year 1904, and from which we shall quote the following:

"RULE 22. The clerk of this court shall issue all preventive annotations (anotaciones preventivas)"—the term used in the translation of the law is "cautionary notices"—"which by the mortgage or other law of Porto Rico may be necessary or required to be filed in the registry of property for the purpose of obtaining a *lis pendens* or any other right or benefit accorded to a party by the laws of Porto Rico against another party or his property situated in Porto Rico

by reason of the institution or pendency of a suit or other proceedings."

The provisions of the Mortgage Law hereinbefore cited constitute a rule of property. They affect the title to and possession of real property and are applicable to titles, and therefore they are binding upon the courts, federal as well as insular.

A rule of property "is a settled legal principle governing the devolution and ownership of property."

24 Am. and Eng. Encyc. of Law, 1011.

"The decisions of the highest court of a State may be said to constitute a rule of property when they relate to and settle some principle of local law directly applicable to titles."

Edwards *vs.* Davenport, 20 Fed. Rep., 756-63.

"The term rule of property means those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto."

Bucher *vs.* Cheshire R. Co., 125 U. S., 555.

The United States Supreme Court, in a case arising under the registration laws of Louisiana, in passing upon the questions that failure to reinscribe a mortgage freed the land conveyed from a mortgage lien, because the mortgagor was chargeable with notice by the *pact de non aliendo* in the mortgage, and because the mortgagee being a minor, his mortgage did not require reinscription to preserve its lien, says:

"These questions have been settled against the appellant by the supreme court of Louisiana.

"That court has decided that under *the positive law of Louisiana as contained in the codes and statutes, nothing supplies the place of registry* nor dispenses with it, so far as those are concerned who are not parties to the mortgage, and that when ten years have elapsed from the date of inscription without reinscription, the mortgage is without effect as

to all persons whomsoever who are not parties to the mortgage.

"In the case of Watson *vs.* Bondurant, 30 La. Ann., 1, the same court held that no mortgage has any effect as to third persons unless recorded; and, save in the single case of a minor's mortgage on the property of his tutor, every mortgage ceases to have effect, except as to the parties to it, unless reinscribed within ten years from the date of its original inscription, and that neither the existence of the *pact de non aliendo* in a mortgage, *nor the pendency of a suit to foreclose the same, obviates the necessity of its inscription or reinscription.*

* * * * * * *

"The decisions above cited, *establishing as they do a rule of real property* in the State of Louisiana, *are binding on this court and are conclusive of this case.*"

Bondurant *vs.* Watson, 103 U. S., 281.

So far as we have been able to ascertain this decision stands today as the law, and the great similarity of the statutory provisions therein passed upon with those now before the court makes of this case one of much weight. Under the laws of Louisiana, as they existed at the time this decision was rendered (1880), the validity of a mortgage depended upon its registration; under the laws of Porto Rico the registration of a complaint in a suit over real estate is the only means to secure a lien as against third persons and to charge the world with notice thereof. In both cases a right is accorded, and registration or inscription is required to secure its advantage. If the provisions of the statutes of Louisiana are a rule of property those of the Mortgage Law of Porto Rico are equally so, since both apply to titles thereto, and the United States district court is bound to follow the latter, whether in cases arising in equity or at law.

In a case which arose in South Carolina, under the provisions of the Code of Civil Procedure of that State relating to the filing of *lis pendens* and its effects, the circuit court of appeals of the United States for the circuit, when passing

upon the allegations of the petition which related to the filing of the notice of *lis pendens,* said:

"The allegations of the petition relating to the notice of *lis pendens* have even less merit, if that be possible, than those relating to tenancy. Under section 153 of the Code of Civil Procedure of South Carolina, it is only *a subsequent purchaser or encumbrancer who is protected by the failure to file the notice of lis pendens.* The petitioner is neither, nor is the party for whom he pleads, under whose authority he claims his tenancy exists."

Vance *vs.* Wesley, 85 Fed. Rep., 157-61.

This rule, that where the local laws of a state constitute a rule of property the federal courts are bound to apply them, has been carried so far as to cover registration statutes of a State as to the competency as evidence of the records of deeds (Union Pac. Ry. Co. *vs.* Reed, 80 Fed. Rep., 234); and it has been also extended to a right of redemption after a sale on foreclosure of mortgage, given by a State statute to the mortgagor, and after him to his judgment creditor (Brine *vs.* Ins. Co., 96 U. S., 627; Ins. Co. *vs.* Cushman, 108 U. S., 51).

If the rule has been extended so as to cover these cases, it should be equally extended to cover the case at bar.

The authorities herein discussed and referred to sufficiently support the conclusion that the order and decree entered by the court below sustaining the demurrer filed by the defendant should be reversed.

All of which is respectfully submitted.

FREDERICK L. CORNWELL,
Counsel for Appellant.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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JAMES H. McKENNEY
CLERK

No. 269.

HIGINIO ROMEU, APPELLANT,

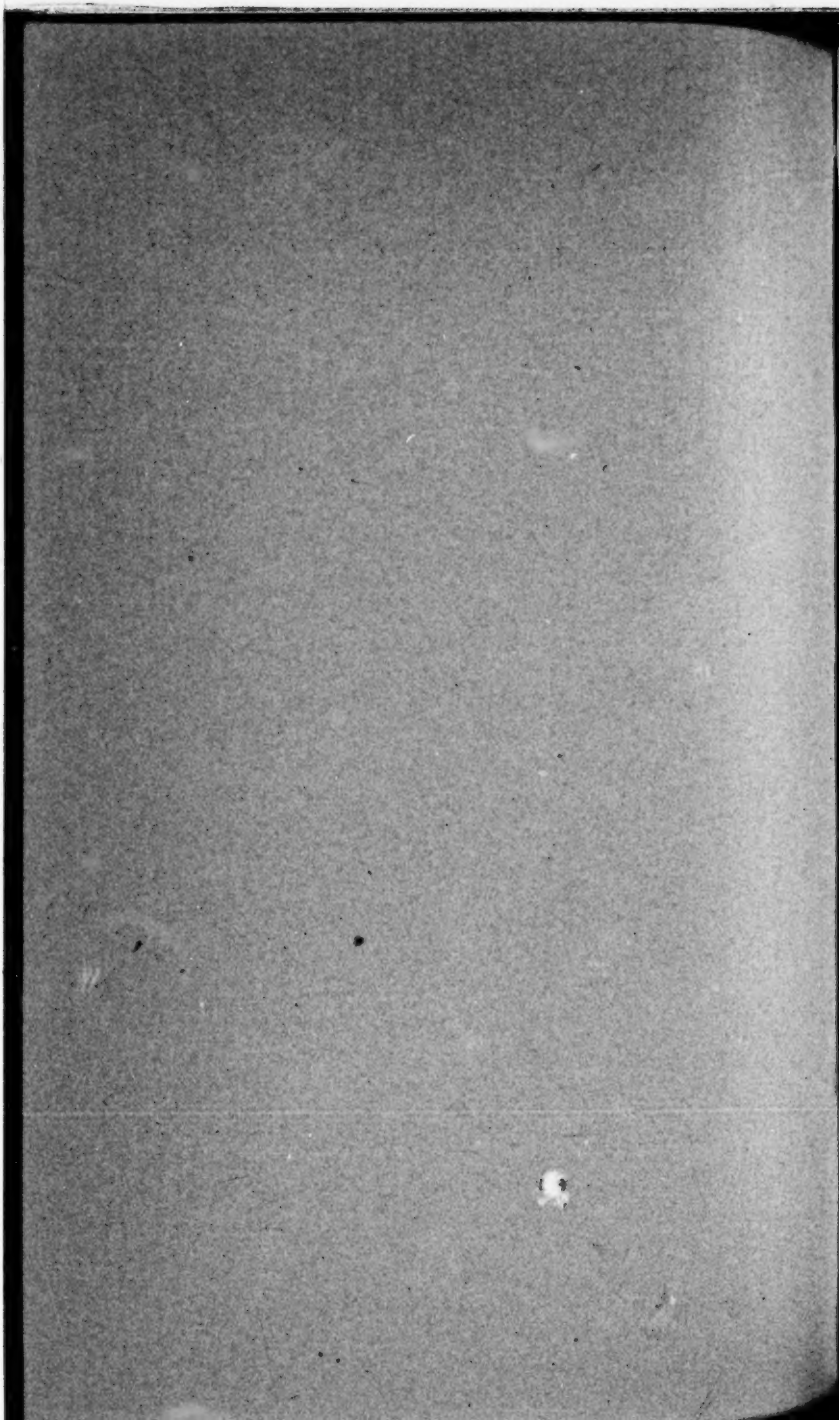
vs.

ROBERT H. TODD.

BRIEF FOR APPELLEE.

N. B. K. PETTINGILL,
Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25749



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 269.

HIGINIO ROMEU, APPELLANT,

vs.

ROBERT H. TODD.

BRIEF FOR APPELLEE.

This case comes up on appeal from the final decree of the District Court of the United States for Porto Rico. The brief for appellant contains a fairly correct statement of the facts shown by the record, which counsel for appellee is willing to adopt in all important respects. If any slight variances appear, attention will be called to them in the course of the argument. One inaccuracy, which occurs both in the allegations of the bill of complaint shown in the record and in the statement of facts by counsel, is the description of the bill of complaint in the original suit of Todd *vs.* Agostini as a creditors' bill, while it was in fact a bill to subject the real estate in question to the lien of a particular judgment obtained by Todd. But this is perhaps immaterial, as both pleading and statement admit that, in the bill of complaint in said original suit, the tract of land now in controversy was "specifically de ibed," and the doctrine of *lis pendens* would equally apply.

ARGUMENT.

If a litigation pending in any court of the United States within the States had taken the same course as that herein involved, and the same question now brought before the court on this appeal had come from a Federal court in any one of the States, we think there can be no question how it would be decided, because there seems to have been a uniform line of decisions from early times as to the application of the equitable doctrine of *lis pendens*, which, as we understand it, is entirely distinct from the statutory *lis pendens* which is provided for in many States in suits at law.

While the court is undoubtedly familiar with the general principles underlying this doctrine and with the general trend of the decisions in which it has been applied, we beg the indulgence of the court for quoting some paragraphs from leading cases which seem to have special application to the case at bar, as well as the statement of the underlying principle by Mr. Pomeroy in his work on Equity Jurisprudence:

> "It has been stated in numerous judicial opinions, and the same view has been repeated by text-writers, that the rule concerning the effect of *lis pendens* is wholly referable to the general doctrine of constructive notice. It has been said that a pending suit in equity operates as a constructive notice to the world, and that a purchaser *pendente lite* is bound by the final result of the litigation, because he is charged with such a notice of the proceeding, entirely irrespective of any information which he may or may not have had. Courts of the highest ability and authority have, however, adopted a somewhat different theory. According to this view, it is not correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so described its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give

to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit should be binding, not only on litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. * * * It must not be supposed that this mode of explanation affects in the slightest degree the settled rules concerning *lis pendens*, or alters the rights and liabilities of alienees from a party to a suit during its pendency.

"If we adopt this *rationale* of the rule as correct, the general rule may be accurately formulated as follows: During the pendency of an equitable suit, neither party to the litigation can alienate the property in dispute, so as to affect the rights of his opponent. This brief proposition in reality contains the entire doctrine. Adopting, however, the ordinary mode of explanation which regards the effect of *lis pendens* as merely a particular instance of constructive notice, 'the general and established rule is,' using the language carefully chosen by Chancellor Kent in a leading case, 'that a *lis pendens*—a pending suit in equity—duly prosecuted, and not collusive, is notice to a purchaser of the property in dispute from a party to the litigation, so as to affect and bind his interests by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.'"

Pomeroy's Equity Jurisprudence, secs. 632, 633.

In the leading case decided by Chancellor Kent, above referred to, early in the last century, the following statement is made (after discussing the question of notice):

"But it will not be necessary to rest the cause on this ground. The other point which has been pressed for consideration appears to be altogether conclusive.

Admitting that Ballou had no knowledge, in fact, of the suit of Mrs. Green against Winter, when he made the purchase, he is nevertheless chargeable with legal or constructive notice so as to render his purchase subject to the event of that suit. The established rule is that a *lis pendens,* duly prosecuted and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the subpœna after the bill is filed.

"The counsel for the defendant have made loud complaints of the injustice of this rule, but the complaint was not properly addressed to me; for, if it is a well settled rule, I am bound to apply it, and it is not in my power to dispense with it. I have no doubt the rule will sometimes operate with hardship upon a purchaser without actual notice; but this seems to be one of the cases in which private mischief must yield to general convenience; and, most probably, the necessity of such a hard application of the rule will not arise in one out of a thousand instances. On the other hand, we may be assured the rule would not have existed, and have been supported for centuries, if it had not been founded in great public utility. Without it, as has been observed in some of the cases, a man, upon the service of a subpœna, might alienate his land and prevent the justice of the court. * * *

"I have said that *lis pendens* was of itself notice to the purchaser, and it will now be proper to show that this rule is well established in our law. It is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation. It was one of the ordinances of Lord Bacon, laid down for the better and more regular administration of justice in the court of chancery, that 'no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant, before the bill exhibited, and is made no party either by bill or order; but where he comes in *pendente lite,* and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth' (Bacon's Works, vol. 4, page 511). Here we find the rule de-

clared above two centuries ago and by the highest authority to which we can appeal; and it will appear to have received support and application down to this day" (reviewing many cases).

Murray *vs.* Ballou, 1 Johnson's Chan., 566.

"In County of Warren *vs.* Marcy, 97 U. S., 96, it was said to be a general rule that 'all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their peril, purchase the same from any of the parties to the suit!' While this rule was said not to apply to negotiable securities, purchased before maturity, nor to articles of ordinary commerce sold in the usual way, it was held to be applicable to cases relating to land. And in support of this view was cited the case of Murray *vs.* Ballou, 1 John. Ch., 566, in which Chancellor Kent laid it down as an established rule that [here follows quotation as above]. Here the So. Inland Navigation & Improvement Co. accepted a conveyance of the lands in question from the trustees of the Int. Imp. Fund, after service of the subpœna, and a copy of the injunction, upon the trustees, its grantors. That company, therefore, took its titles *pendente lite*, and its mortgagee, the Union Trust Company, was bound by the final decree rendered in the case to the same extent that it is bound."

Union Trust Co. *vs.* Southern, etc., Co., 130 U. S., 565.

"We have considered the case just as if the present suit had been brought by Hill. The appellants have no greater right than he would have, if the present suit had been instituted by him; for Mellen, the trustee for Boyd, acquired his rights *pendente lite*. Hill sold and conveyed to him after he had been personally served with copies of the order to appear and plead, answer or demur to the original and supplemental bills, and only three days before the time fixed for his appearance to the original suit. His sale was more than three months after he was required to appear, and plead, answer or demur to the cross-bill. That sale and conveyance could not affect the power

of the court to proceed to a final decree, so far as his interest in the property was concerned. Nor by such sale and conveyance did Mellen and his *cestui que trust* acquire any absolute right to become a party to the suit instituted by the Furnace Company. Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limit of its power, in respect to the interest their vendor had in the property purchased by them *pendente lite*" (citing authorities). "As said by Sir William Grant, in Bishop of Winchester *vs.* Paine, 11 Vesey, 194, 'the litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise such suits would be interminable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.'"

Mellen *vs.* Moline Iron Works, 131 U. S., 352.

Other cases to the like effect are the following, to which might be added many more:

Murray *vs.* Lylburn, 2 John. Ch., 441.
County of Warren *vs.* Marcy, 97 U. S., 105.
Miller *vs.* Sherry, 2 Wall., 237.
Terrell *vs.* Allison, 21 Wall., 289.
Lacassagne *vs.* Chapuis, 144 U. S., 119.

II.

While the appellant does not directly controvert the foregoing principle and authorities quoted, his counsel attempts to avoid them by claiming that they are not applicable in Porto Rico on account of the different system of laws prevailing there, and makes extensive quotations from the mortgage law, which is one of the special laws recognized and left in force by Congress when it enacted the civil government

act for Porto Rico in April, 1900 (31 Stats. at Large, 77). But, by section 34 of the same act, Congress established a Federal judicial district in Porto Rico and conferred thereby the following powers:

> "The district court for said district shall be called the District Court of the United States for Porto Rico and shall have power to appoint all necessary officials and assistants, including a clerk, an interpreter, and such commissioners as may be necessary, who shall have like power and duties as are exercised and performed by commissioners of the circuit courts of the United States, and shall have, in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

As we have always understood, and as we believe Congress intended, this is a grant of full equity powers to the United States court established thereby; otherwise it could not have "jurisdiction of all cases cognizant in the circuit courts," nor could it "proceed therein in the same manner as a circuit court." This provision has always been by that court interpreted as such a grant of power, and further, as a requirement to maintain the distinction between the law and equity sides of the court and the pleading and procedure to be followed on each side, and that interpretation has had the tacit approval of this court, by its consideration and decision of cases purely equitable in their nature, in Rodriguez *vs.* Vivoni, 201 U. S., 371, and Garrosi *vs.* Dastas, at the present term.

It may be true that the engrafting of an equitable jurisdiction on the laws of Porto Rico constituted a departure from the system of law formerly prevailing there, but it does not follow that such departure was not a beneficent exercise of the power of the new sovereign. In any event, it seems to us such was the intention of the Congress and an evi-

dence of its desire to give to the new territory, by bestowing upon it the dual system of courts existing in the States, all the advantages for the most perfect administration of justice. If the people of Porto Rico were unacquainted with equitable rights and remedies, no one will contend that it was otherwise than beneficial to the people as a whole to have such remedies placed within their reach; but we need look no farther than the plain intent of the Congress, expressed in the above act. If that gave, as we believe it did, full equity powers to the District Court of the United States for Porto Rico, that court was at liberty to exercise those powers to the same extent and in the same manner as a circuit court of the United States in any one of the States, and the pendency of a suit in equity in said court must have in all respects the same effect as in the same court of the States. As was said by this court in a leading case:

> "The equity jurisdiction of the courts of the United States is derived from the Constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by State legislation."
>
> Noonan *vs.* Braley, 2 Black, 499.

Also, as was said by Mr. Justice Harlan, after citing the language of a decision as to the application of a statute of limitation in an action based upon a fraud:

> "They are peculiarly applicable to a local statute which, if followed, would impair the power of the courts of the United States to enforce the settled principles of equity in suits of which they have, by the Constitution and laws of the United States, full jurisdiction. While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the

several States, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, their jurisdiction in equity cannot be impaired by the local statutes of the different States in which they sit."

Kirby *vs.* Lake Shore R. R. Co., 120 U. S., 130.

Many other decisions might be cited to the like effect. It, then, only remains to be determined whether the doctrine of *lis pendens* and its effects are necessary ingredients of the jurisdiction of a court of equity. This question is easily decided by the arguments advanced in the first cases cited in this brief. If a litigant is to enjoy the full benefits of the equity jurisdiction and processes—the same in one State as another, the same in the Territory as in the State—he must be equally protected as to the results of his suit if he wins. If the doctrine of *lis pendens* is proper and necessary to the protection of the rights of a litigant in an equity court in a State, it is equally so to the same litigant in the Territory; and if this court has not the same power to enforce its decree as against a purchaser *pendente lite* as the circuit court of the United States in a State, it cannot "proceed therein in the same manner as a circuit court," as the above-cited law of Congress provides.

III.

The main contention of appellant, however, seems to be that even courts of equity of the United States in a State are bound by the statutory provisions for recording a *lis pendens* when such provision has been enacted in such State. But in this contention counsel fail to distinguish between cases at law and cases in equity, and an investigation of the cases cited will show that they are cases upon the law side of the court.

The case of Vance *vs.* Wesley, 85 Fed. Rep., cited on page

19 of appellant's brief, is a case at law, because it is based on the Code of Civil Procedure of South Carolina.

The case of Smith *vs.* Gale, 144 U. S., 509, which is cited on page 13 of brief of appellant, came up from the Supreme Court of the Territory of Dakota, having been instituted in the fourth district of the Territory of Dakota in 1882, under the Civil Code of Procedure of 1877, then in force in the Territory.

This Code (p. 509, §3) "excludes" the "common law," (p. 514, §33), abolishes all distinction between actions at law and suits in equity, and provides (p. 526, §101) for the filing of notice of *lis pendens,* and that—

> "From the time of filing *only* shall the pendency of the actions *be constructive notice* to the purchaser or encumbrancer of the property affected thereby * * * an action shall be deemed to be pending from the time of the filing of such notice." (Italics supplied.)

The only other decision of this court cited on behalf of appellant, Bondurant *vs.* Watson, 103 U. S., is clearly not in point. We have no quarrel with the proposition there laid down, that a rule of property established by decisions of the highest court of the State are binding on the Federal courts of the same State; but we most earnestly urge that we are, in the case at bar, not dealing with a rule of property, but with a principle of equity jurisdiction and procedure. There is every difference between the question whether an equity court shall properly protect the litigants before it and the question whether a mortgage shall be valid or invalid because not recorded. The whole argument of counsel for appellant goes off on the proposition that the mortgage law must be complied with, while his own quotations from that law show that it concerns itself solely with questions of registration of *conveyances or liens* affecting real property—and that this suit did not involve either of those matters, we shall argue in the subsequent subdivision of this brief. We shall content ourselves now with citing a few cases upon the

present proposition, that State or Territorial recording or registry laws have nothing to do with the validity of equitable *lis pendens* and its effects.

The case of Lacassagne *vs.* Chaupis, 144 U. S., 119, hereinbefore cited, is an instructive case upon the doctrine of *lis pendens,* and particularly so because it came up from Louisiana, where the civil law prevails, and where, as counsel says on page 18 of his brief, there is great similiarity to the mortgage law of Porto Rico. There Lacassagne and one Maxwell had a recorded mortgage against certain property, and a certain widow, Cavé, brought an equity suit against one Cavailhez, claiming title to the same property; but nothing was recorded touching the pendency of said suit. This court afterward declared on that appeal that said suit of the widow Cavé was fraudulent and the court was without jurisdiction; yet it was said that the pendency of it was notice to all the world, and that even *bona fide* mortgagees could not acquire rights in said property pending said suit without becoming parties to it. And the court winds up the discussion with the general statement that—

> "It is well settled, in regard to land, that, when a suit is pending in regard to it, a person who purchases under the defendant *pendente lite* is subject to the operation of a writ of possession if one is finally issued on a judgment in the suit."

The same conclusion has also been reached, and very pertinent language used, by a State court of high standing in a decision where the facts completely covered those of the case at bar, and we therefore beg the indulgence of the court in quoting therefrom:

> "The suit to foreclose the mortgage was commenced in the United States Circuit Court of the proper district on the 8th day of July, 1884, and the appearance of the defendants duly entered on the same day. That suit,which was regularly and continuously prosecuted, resulted in a decree of foreclosure, rendered on the 13th day of January, 1886, under which all

the property was sold, and the sale confirmed June 22, 1886. The purchasers afterward received their deed for the property and conveyed it to defendant company in due form. * * * The plaintiff below, and the several cross-petitioners, except Fox, recovered their judgments against the railroad company after the commencement and during the pendency of the foreclosure suit, and none of them were made parties thereto. * * * It is claimed by the defendants in error that all these judgment creditors except Fox are bound by the decree in the foreclosure suit. * * * That the court in that suit had jurisdiction of the parties, and of the property included in the mortgage, is not questioned; nor is it that the prosecution of the suit was close and continuous; and it is well settled that all persons who, in such case, purchase or otherwise acquire an interest in the subject of the litigation, take with constructive notice of the pendency of the suit, and will be bound by its results though not made a party. * * * The rule is founded in necessity, as well as upon public policy, as, without it, the judgment of the court could in all cases be frustrated, or rendered ineffectual, by conveyance or incumbrance made or suffered during the pendency of the suit; new suits would then become necessary against those so obtaining an interest in the subject of the action, who might, in the same way, compel still further suits, and so on, until there would be no end to the litigation. * * * It is contended, however, by counsel for the plaintiff in error that section 5056 of the Revised Statutes (of Ohio) forbids the application of the rule in this case and prevents the foreclosure suit brought in the United States court from operating as a *lis pendens*, affecting the liens of the judgments recovered in Huron county. That section provides that 'when any part of real property, the subject-matter of an action, is situated in any county or counties other than one in which the action is brought a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons, as provided in the preceding section; but it shall operate

as such notice without record in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute which does not require such record.' * * * These sections belong to the Code of Civil Procedure, and it is obvious they relate to actions brought and judgments rendered in the State courts, and not to those in the courts of the United States. * * * Similar statutes have received like construction elsewhere. A statute of the State of Virginia provided that 'no *lis pendens* or attachment against the estate of a non-resident shall bind or affect a purchaser of real estate without actual notice thereof, unless and until a memorandum setting forth the title of the cause, the general object thereof, the court in which it is pending, a description of the land and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situated, who shall forthwith record the said memorandum in the deed book and index the memorandum by the name of the person aforesaid.' When that statute was in force, an assignee in bankruptcy brought suit in the Federal court at Richmond, to set aside as fraudulent a deed for certain real property in Petersburg. Pending the suit, a third person in good faith purchased the property from a defendant, and paid full value for it, without notice of the fraud or pending suit. The court held he took nothing by his purchase as against the decree in the Federal court, notwithstanding no *lis pendens* was filed or recorded as required by the Virginia statute (Rutherglen *vs.* Wolfe, 1 Hughes, 78). In the case of Wilson *vs.* Hefflin, 81 Ind., 35, it appeared that during the pendency of a suit in the Federal court to reform a mortgage so as to embrace a tract of land not described in it, and to foreclose the mortgage, when so reformed, Wilson purchased the land, which was situated in a county where the Federal court did not sit, and where, upon the records, the title was in the name of his grantor, and no incumbrance of the land appeared of record. His purchase was made in good faith, for value, and without actual notice of the mistake in the mortgage, or the pen-

dency of the suit to reform and foreclose it. Subsequently the court decreed reformation of the mortgage and sale of the property. In an action brought by Wilson, who was in possession of the land, to quiet his title as against the decree of the Federal court, he relied on the statute of Indiana which had not been complied with, similar in its provisions with that of Virginia, heretofore mentioned; but the court decided against him, holding that the statute had 'no effect upon suits in the United States courts.' And in Major *vs.* Cowell, 51 Cal., 478, it was held that the clause of the Practice act of that State 'relating to the filing of a *lis pendens* does not apply to suitors except in the State courts.'

"It follows that the judgments recovered against the defendant railroad company while the suit was pending in the Federal court to foreclose the mortgage embracing the property which it is sought to subject to their payment, created no lien, nor gave any right or remedy to those creditors which can now be enforced or made effectual against the property."

Stewart *vs.* Lake Erie, etc., R. R. Co. (Ohio), 29 L. R. A., 438.

We believe no further argument is needed than that contained in the foregoing opinion to make absolutely clear the logic of our position and to show that the precedents are consonant therewith.

IV.

There only remains to be explained away the misapprehension of counsel for appellant as to the purpose and result of the original suit of Todd *vs.* Agostini. The bill of complaint in that case did not pray for the rescission or cancellation of any mortgage or conveyance; it merely prayed that the defendant Merle might be decreed to hold the title of the property in question as a trustee for Agostini, the latter having furnished the money with which it was bought, and that title might be held to be subject to the lien of the Todd judgment. The decree naturally was, first, that Agostini

should pay the amount of the judgment, and, second, and only in case such amount was not paid, that the title held by defendant Merle in trust should be sold to satisfy the judgment lien. It is true that the *result* of the decree might have been to change the title of the property, but that was not the purpose of the bill. So, also, as regards the rights of Romeu. The application of the doctrine of *lis pendens* does not rescind or annul the conveyance from Merle to Romeu, as between the parties. Romeu has as good title to the property as Merle had to give; he merely takes it subject to the same lien. So all the various provisions of the mortgage law referred to by counsel for appellant simply have no application to the case.

Indeed, the commentator relied upon by counsel does not go far enough to avail him. The quotation made from the work of Galindo and Escosura, at the bottom of page 7 and top of page 8 of his brief, is fatal to his contention, because it is there plainly said that the cautionary notice allowed by the mortgage law does not even cover "the case of a suit for the ownership of an interest in real estate," but is limited to "him who sues for the ownership of real property, or the creation, declaration, modification, or extinction of a property right." The above analysis of the character of the suit is sufficient to show that it came within neither of the described classes; hence counsel are claiming that we should have done what the law did not permit us to do, much less require of us. The commentator says it ought to have been provided for and was not. If that be true, another reason is added why the appellant cannot rely upon his alleged search of the registry, because he was looking for something which had no place there.

V.

The principle of *lis pendens* resulting from the bringing of an equity suit involving real estate specifically described in the bill is thus seen to be inseparable from the exercise of

the equity jurisdiction and necessary for the orderly conduct and prompt termination of litigation; otherwise it would be a race to see which could first reach the registry of property, the complainant, with his notice to be filed, or the defendant, with his conveyance in fraud of his opponent. Its necessity is independent of time, place, or circumstance, and its application, in the words of Chancellor Kent, "one of the cases in which private mischief must yield to general convenience."

We therefore submit that our demurrer to the bill of appellant in the court below was rightfully sustained and the bill dismissed, and we respectfully ask that this appeal be also disallowed and the decree of the court below affirmed.

Respectfully submitted,

N. B. K. PETTINGILL,
Counsel for Appellee.

Supreme Court of the United States.

No. 269.—October Term, 1906.

Higinio Romeu, Appellant, *vs.* Robert H. Todd. } Appeal from the District Court of the United States for the District of Porto Rico.

[May 27, 1907.]

Mr. Justice White delivered the opinion of the Court.

Robert H. Todd obtained a judgment in the United States Provisional Court of Porto Rico in the year 1900 for the sum of $2,946.05 against Pedro and Juan Agostini, and execution to enforce the same was returned *nulla bona*. Thereupon Todd, in 1901, filed a bill in equity in the United States Court for the District of Porto Rico against the judgment debtors (the two Agostinis) and one Ana Merle for the purpose of enforcing the judgment upon certain real property of which Ana Merle stood upon the public records as the owner. The ground was that the property had been paid for with the money of the Agostinis and was hence liable to be applied to their debts. Without further detail it is only necessary to say that the court decreed that a certain parcel of land described in the bill had been purchased by Ana Merle with funds belonging to Pedro Agostini, and said Agostini "was the owner of the equitable and beneficial title of the same." And it was ordered that to pay the indebtedness to Todd the property, with the improvements thereon, be sold at public sale by a commissioner appointed for that purpose. Whilst this suit was pending, before decree, the piece of real estate embraced by the decree was sold by Merle to Higinio Romeu, the plaintiff in error. The present bill was filed on behalf of Romeu against Todd to enjoin the sale of this piece of property. The bill alleged the bringing of the Todd suit, the purchase by Romeu pending such suit, the decree rendered therein as above stated and the fact that the decree was about to be executed. It was averred that the purchase by Romeu had been made for an adequate consideration, with the utmost good faith and without knowledge of the pendency of the Todd suit; that the property since it was bought by Romeu had been largely improved by him, and that, as no cautionary notice concerning the Todd suit, as authorized and required by the law of Porto Rico, had been put upon the records, the property acquired by Romeu under the circumstances alleged was not subject, in Romeu's hands, to the Todd

decree. A temporary restraining order was allowed. The bill was demurred to on two grounds—first, that it stated no cause of action, and second that, admitting all its averments to be true, as the property was bought whilst the equity cause was pending, the purchaser took subject to the *lis pendens*. The demurrer was sustained, and, Romeu electing not to plead further, a final decree was made dismissing the bill.

The court below, in its opinion, assumed that under the local law a third party in good faith purchasing from or dealing with the registered owner of real estate, without notice in fact of the existence of a pending suit concerning the title to property, was not to be treated by operation of law as constructively notified of the pendency of the suit, unless the cautionary notice, which the law of Porto Rico required to be put upon the record, was given. But whilst so declaring, it was nevertheless decided that the local rule of real property referred to was not controlling in this case. This ruling was based upon the conception that the constructive notice resulting from a suit in equity in the United States Court for Porto Rico was to be imputed, irrespective of the positive requirements of the local law. The court said:

"As this is a proceeding on the equity side of the court it is governed by the principles of equity followed by the Federal courts as distinguished from suits at law where local statutes are adopted. As local laws have no binding force upon the United States courts in matters of procedure in equity and maritime law, the laws of Porto Rico relating to filing of notice of *lis pendens* have therefore no application in this case and the sufficiency of this bill must be determined by the rules and principles followed in like proceedings in the courts of the United States" (*Stewart* v. *Wheeling & Lake Erie R. R. Co.*, 29 L. R. A. 438.)

Proceeding then to apply what it deemed to be the conclusive force of decisions of this court, it was held that the pendency of an equity cause in a court of the United States affecting real property constituted constructive notice as to third parties and was therefore operative against those dealing with the owner as to such property in good faith, any rule of State law to the contrary.

In the argument at bar on behalf of the appellee the correctness of the ground upon which the court based its decision is insisted on as follows:

"The main contention of appellant, however, seems to be that even courts of equity of the United States in a State are bound by the statutory provisions for recording a *lis pendens* when such provision has been enacted in such State. But in this contention counsel fail to distinguish between cases of law and cases in equity, . . ."

Nevertheless, in substance, it is contended that even if the court below was wrong in its reasoning, it was right in its conclusion. This rests on the proposition that the court mistakenly assumed that the local law pro-

vided for a notice of the pendency of suit of the character of the Todd case and protected an innocent purchaser where a notice was not given.

That issue arises, therefore, and as it underlies the question whether the court should have applied the local law, we come first to ascertain the local law concerning notice and its effect.

It appears certain that by the ancient Spanish law the sale or the dismemberment by mortgage of the ownership of real property, which was involved in a pending litigation, was forbidden. (Law 13, Tit. 7, Part. 3; see also Resolution of November 29, 1770, referred to in commentaries upon the Spanish mortgage legislation by D. Leon Galindo y De Vera, ed. 1903, vol. 2, p. 594.) The result was that acts done in violation of the prohibitory law were void, even as to innocent third parties. But as pointed out by the author, just referred to, the prohibition in question was omitted from the Spanish Civil Code, and, therefore, the right to deal with real property, involved in a pending litigation, was no longer prohibited. And when the comprehensive system, known as the mortgage law, came to be adopted, the power of the record owner of real property involved in litigation to mortgage or contract concerning the same was not left to the implication resulting from the disappearance of the ancient prohibitions, but was expressly recognized by articles 71 and 107 of the mortgage laws. D. Leon Galindo y De Vera, in his commentaries, considering the provisions of the mortgage law concerning the power of the owner of real property to deal with it *pendente lite*, and of the right of the plaintiff in a suit affecting such property to obtain a cautionary notice, and his duty to record the same in order to affect third parties, points out that these provisions were the natural result of three considerations: respect for the rights of property, regard for the rights of one seeking redress in the courts against such owner, and solicitude for the public interest. Because of the first the owner was not deprived of his right to dispose of his real property merely because a suit relating to the same had been brought against him, but was left free to make contracts concerning the property, if any one could be found willing to do so, and thus assume the risk of the pending litigation. On account of the second consideration a means was provided for giving a notice by which one who brought suit would be able to secure the results of an ultimate decision in his favor. Because of the third those dealing in good faith, in reliance on the public records, were protected from the risks of pending suits, unless the cautionary notice was made and recorded according to the statute.

That the essence of the statute was the protection of innocent third parties dealing with the recorded owner when no cautionary notice had been given is obvious. Answering the contrary contention, D. Leon Galindo y De Vera says (p. 192):

"That is not so; if the mortgagor has on the record the ownership of the properties in litigation and those who claim the properties have not made the cautionary notice on the register, and the writing establishing the mortgage does not show that the properties are in litigation, the debtor can freely mortgage them, and the mortgage will have effect, even when the decision of the case is in favor of the plaintiffs, declaring that the ownership of the properties mortgaged belongs to them."

See articles 71 and 107 of the "Mortgage Law for Cuba, Porto Rico and the Philippine Islands," War Department Translation, 1899, and see also title 2 of the same law concerning the method of recording instruments and the effect of such record, and title 3 relating to cautionary notices.

Granting that the general result of the local law is as we have just stated it, the contention yet is that the character of the Todd suit and the nature of the relief sought therein caused it to be not within the scope of the mortgage law, and the provisions thereof for giving a cautionary notice. This is based upon article 42 of the mortgage law, reading:

"Art. 42. Cautionary notices of their respective interests in the corresponding public registries may be demanded by:

"1. The person who enters suit for the ownership of the real property, or for the creation, declaration, modification, or extinction of any property right. . . ."

And article 91 of the general regulations for the execution of the mortgage law, War Department Translation, 1899, as follows:

"The person who brings action for ownership, referred to in case No. 1 of article 42 of the law, may at the same time or subsequently request that a cautionary notice thereof be made, offering to indemnify any damages which may be caused the defendant thereby, should he win the suit."

Now, it is said when the issues in the Todd suit are clearly apprehended they were not within the purview of the articles in question, since that suit did not seek to divest Ana Merle of the ownership of the property standing in her name on the public records, but simply to subject such property to the payment of the indebtedness due by the Agostinis to Todd. This, however, assumes that article 42 embraces only suits having for their object the entire divestiture of ownership—that is, the divestiture of perfect ownership—whilst the text of the article relied upon not only relates to suits so operating, but also to those which seek the modification "or ~~extension~~ extinction of any property right." But even if the proposition relied upon might find some color of support in a narrow and technical construction of the provisions of the mortgage law referred to, its unsoundness is, we think, demonstrated by a consideration of other provisions of the law, especially articles 2 and 23 of that law, the first reading as follows:

"In the registries mentioned in the preceding article shall be recorded:

"1. Instruments transferring or declaring ownership of realty, or of property rights thereto.

"2. Instruments by which rights of use and occupancy, emphyteusis, mortgage, annuity (censo), servitudes, and any others by which estates are created, acknowledged, modified, or extinguished."

The second (art. 23,) reads as follows:

"The instruments mentioned in articles 2 and 5, which are not duly recorded or entered in the registry, cannot prejudice third persons."

Mark the constructive power of the provision of the second paragraph of article 2, requiring the registry, in order that they may affect third parties, of all acts "by which estates are created, acknowledged, modified or extinguished" when applied to the words of article 43, providing for the registry of a cautionary notice, not only of all suits for the "ownership of real property," but likewise of suits brought "for the creation, declaration, modification or extinction of *any property right.*"

Besides, when the purpose of the mortgage law is borne in mind, it is apparent that the interpretation relied upon would frustrate the very ends which the adoption of the law was intended to subserve.

But, passing this view, it is, we think, clear that the proposition rests upon a misconception of the true import of the bill in the Todd case. The property stood upon the records, not in the name of the Agostinis, but in the name of Merle. The bill alleged that the Agostinis, and not Merle, owned the property, because it had been bought and paid for by the former. The purpose, therefore, of the suit was to change the recorded title by in effect obtaining a decree placing the property in the name of the real owner. In the very nature of things, under the civil law, the cause of action thus asserted was not merely revocatory, (the Actio Pauliana of the Roman law,) but was an action to unmask a simulation. It was therefore essentially revendicatory. (*Bonnafon* v. *Wiltz*, 10 La. An. 657; and see the copious list of authorities illustrating the subject, compiled in Hennen's La. Dig. vol. 2, p. 1031, No. 1.) The decree rendered conforms to this conclusion. It held Pedro Agostini to be the "owner of the equitable and beneficial title" to the property. It therefore divested the registered owner, Merle, of every essential element of ownership. This is clearly the case, since the *fructus*, the *usus* and the *abusus* could not be in one who was stripped of all beneficial interest. This becomes more clearly manifest when it is borne in mind that the civil law prevailing in Porto Rico is oblivious concerning a technical or formal distinction between legal and equitable title. As beyond peradventure, then, the suit and the decree took from the recorded owner the ownership upon which necessarily the innocent third party must have relied, we think it clearly follows that the cautionary notice required by

the provisions of the mortgage law was essential to affect the innocent third person.

The remaining question, then, is, Was the local statutory rule of real property, requiring the giving and recording of a cautionary notice of the pending suit in order to affect innocent third parties dealing with the recorded owner, applicable to a suit brought on the equity side of the United States District Court for Porto Rico? Let us assume, for the sake of argument, that the lower court correctly reasoned that an innocent third party would be affected by the constructive notice resulting from the pendency of an equity cause in a Circuit Court of the United States sitting within a State. Again, let us further assume, for the sake of argument, that it was correctly held that the rule just stated would govern, although there had been no compliance with a statutory rule of property prevailing in such State requiring the recording of a notice of the pendency of suits affecting real property, in order to make the same operative against innocent third parties. Neither of these concessions, we think, is here controlling. The District Court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates wholly from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does. Now, by section 8 of the act commonly known as the Foraker Act (31 Stat. 79, chap. 191) it is provided as follows:

"SEC. 8. That the laws and ordinances of Porto Rico now in force continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States. . . ."

The provision just quoted, it may be added, is qualified by a proviso repealing enumerated provisions of the local laws concerning marriage, divorce and other subjects.

Now, as a general proposition, it is clear that as a result of the relation which Porto Rico occupies to the United States all the local law of that island has its ultimate sanction in the lawful exercise by Congress of its legislative authority. So also, as Congress has provided that the local law, "not inconsistent or in conflict with the statutory laws of the United States," shall remain in force "until altered, amended, or repealed by the legislative authority hereinafter provided for Porto Rico or by act of Congress of the United States," it must follow that the local law of real property prevailing in the island is controlling until changed, as provided

by Congress. This being true, we cannot assent to the conclusion that the court of the United States created by Congress had the authority to disregard the local law which Congress by express legislation directed to be continued in force. But it is said that the act (sec. 34) in providing for the District Court of the United States for Porto Rico declared, among other things, that that court shall have, "in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Courts of the United States, and shall proceed therein in the same manner as a Circuit Court." From this it is argued that the constructive notice resulting from the equity cause in the District Court for Porto Rico must, in the nature of things, be operative against innocent purchasers without reference to the local law prevailing for cautionary notices and registry, if such result would flow from an equity cause pending in a constitutional court of the United States sitting within one of the States. But the proposition begs the question, since it puts out of view the express provision of the act of Congress sanctioning and enforcing the local law, except in so far as Congress had deemed fit to abrogate the same. Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed, nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act, by which a court was created to enforce the local law, empowered the court so created to set at naught the local law by disregarding fundamental rules of real property governing in the island, thereby creating confusion and uncertainty, and hence tending to the destruction of the rights of innocent third parties. Especially is this conclusion rendered necessary when a consideration, previously adverted to, is again called to mind, that is, that all the local law of Porto Rico is within the legislative control of Congress. The considerations which we have thus expounded are illustrated in various other aspects by previous rulings, concerning the construction and import of the Foraker act. (*Crowley* v. *United States*, 194 U. S. 461; *Rodriguez* v. *United States*, 198 Id. 156; *Seralles* v. *Esbri*, 200 Id. 103; *American R. Co.* v. *Castro*, 200 Id. 453.)

The decree of the District Court for Porto Rico must be reversed, and the cause remanded for further proceedings conformable to this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.